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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 743

WILLIAM LEE FREEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-32, 34) is reported at 400 F.2d 992.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1968. A petition for rehearing was denied on October 14, 1968. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to December 13, 1968. The petition for a writ of cer-

tiorari was filed on November 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for bank robbery.

2. Whether, in the circumstances of this case, the trial court committed reversible error in initially permitting the exhibition of guns found at the time of petitioner's arrest, and allowing testimony with respect thereto, where the court subsequently directed the jury not to consider the matter since the guns had not been connected with the robbery.

3. Whether the trial court erred in failing to require that a certain photograph of a man, earlier erroneously identified by a witness as an individual he had seen near the scene of the robbery, be turned over to petitioner.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of bank robbery in violation of 18 U.S.C. 2113(a). He was sentenced to imprisonment for 15 years. The court of appeals affirmed (Pet. App. 33).

1. The evidence disclosed that, at approximately 10:30 a.m., on July 18, 1963, two men entered the Forest Hills branch of the Continental Bank in East Cleveland, Ohio, and announced that they were holding up the bank. Petitioner was identified as one of the robbers; one Peacock, who was holding a gun, was identified as the other (Tr. 24-25, 29, 35, 48-49, 52, 56-57, 62).[1] After ordering the two male employees

[1] Co-defendant Peacock, whose conviction is before the Court in No. 942 Misc., this Term, was convicted of bank rob-

to lie on the floor and the female teller to face the wall, the two men rifled the cash drawers. They thereafter ordered the employees into the basement of the bank and fled the scene (Tr. 31-34, 49-51, 58-59, 63). After the men fled, the manager ran up the steps in time to observe a red Corvair convertible with a white top and out-of-state license plates, carrying two male occupants, "cutting across" a service station (Tr. 63-67). The car was later found abandoned at a nearby transit station parking lot (Tr. 137-138).[2]

Peacock's former girl friend testified that she had accompanied petitioner and his co-defendant to Cleveland in the summer of 1963, and that they had remained there overnight.[3] On the day following their arrival, Peacock left her at a transit station at about 10:00 a.m., and gave her no explanation for his ensuing two-hour absence (Tr. 296-306, 316). Frank Maruna, a customer of the bank, testified that he had observed two men sitting in a red Corvair in front of the bank shortly before the robbery, and identified one of the men as petitioner (Tr. 199-205). Petitioner's girl friend testified that, after pawning petitioner's

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bery in violation of 18 U.S.C. 2113(a) and (d) and was sentenced to 25 years' imprisonment, to run concurrently with two other sentences for bank robberies. "Tr." denotes the transcript of the trial proceedings, which is contained in the file of No. 942 Misc. lodged with the Clerk of this Court.

[2] The evidence showed that the car had been stolen by Peacock from a parking lot in Arlington, Virginia, in the latter part of June 1963 (Tr. 222-227).

[3] Her employer testified from business records that she was absent from work from July 16 to July 19, 1963 (Tr. 329-333).

television set, she had sent him a $50 money order in Cleveland on July 17, 1963, because he had told her he was running out of money (Tr. 193-194; see also Tr. 184-187).[4] Receipts for gasoline purchases for Peacock's car which were charged to petitioner's credit card in the Cleveland area on July 17 were also introduced in evidence (Tr. 338-344, 375, 401).

2. Prior to the cross-examination of witness Maruna, defense counsel requested that any statements relating to the Maruna's earlier identification of a photograph of one Edward Grimm as the man the witness had seen in the car outside the bank—as well as the photograph itself—be turned over to the defense. After the statements—F.B.I. memoranda, unsigned by the witness—were examined by the court, the court gave them to petitioner's counsel. He refused to direct that the photograph of Grimm—which was neither attached to the statements nor physically present in court—be turned over to the defense (Tr. 207-208). Thereafter, defense counsel thoroughly cross-examined Maruna with respect to his earlier, faulty misidentification in an attempt to undermine the reliability of his in-court identification of petitioner (Tr. 210-218).

3. Two eyewitnesses to the robbery testified regarding the appearance of the gun used by Peacock (Tr. 49-50, 60). Prior to testimony by the F.B.I. agent who arrested petitioner, defense counsel presented an an-

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[4] Agent Domalewski further testified that, on two occasions (in September 1964 and January 1965) before he was arrested, petitioner had informed him that he had been "unemployed" since January 1963 and that he had no "specific employment" thereafter (Tr. 361, 366).

ticipatory motion requesting the court to direct the government not to bring before the jury, either physically or by means of testimony, a pistol and a revolver seized from petitioner's apartment at the time of his arrest. Defense counsel asserted that the guns were purchased subsequent to this robbery. After government counsel represented that the government did not know when the guns were purchased, the court stated that it would act upon the motion "at the proper time" (Tr. 363, 364). Thereafter, Agent Domalewski testified about the seizure of the guns incident to petitioner's arrest (Tr. 368-369). At this juncture, a bench conference was conducted, at which defense counsel again objected to testimony about and exhibition of the guns. A ruling thereon was reserved "until further evidence develops" (Tr. 370-371). The agent thereafter identified the guns (Tr. 371-372). The agent was cross-examined by defense counsel concerning the purchase date of the weapons and the reasons for the agent's failure to determine whether the guns had been purchased at a time subsequent to the robbery (Tr. 375-384). Another motion to exclude the guns from evidence and all testimony with respect thereto was denied (Tr. 384-385). A subsequent motion for mistrial on the above grounds was also denied. However, the trial court determined that the guns could not be admitted into evidence, and admonished the jury, at that time, to disregard all physical and testimonial evidence with respect to the guns, stating (Tr. 396-397):

> Members of the jury, there have been certain motions made with reference to the testimony

relative to the guns which have been introduced into evidence by the previous witness.

The Court has given the matter consideration.

These guns, as you recall from the testimony, were found on the dresser in the home of the Defendant Freeman at the time of his arrest.

There has been no testimony connecting these guns with the robbery which occurred on July 18, 1963. For that reason the Court has granted the motion by counsel for the Defendant and wishes to state to the jury that the guns taken at the time of the arrest of Mr. Freeman are not evidence in this case.

In fact the Government has admitted that the guns were not connected, as far as they could determine, with the robbery.

I instruct you that you are not to speculate or make any inference from the fact that there is testimony received regarding these weapons.

The examination was only for the sole purpose of determining whether the weapons were relevant to the issues of the case.

The Court has determined that they are not relative. There is no tie-in. There is no testimony that these guns were used in the robbery.

The jury, therefore, may not consider the testimony regarding these weapons or the fact that they were offered in evidence in any manner whatsoever.

After a full discussion (Pet. App. 22-27), the court of appeals determined that the circumstances "cannot support a conclusion" that the trial court's handling of this matter "constituted prejudicial and reversible error" (Pet. App. 26). This was so, it found, because "the trial court removed the entire matter from the

consideration of the jury by telling them in clear, unmistakable, and concise terms that they were not to consider the matter in any way whatsoever" (Pet. App. 27).

ARGUMENT

1. Petitioner does not contest that he was present in Cleveland, Ohio, on the date of the robbery (Pet. 5), but argues that the evidence of his complicity in the commission of the offense was insufficient to support the jury's verdict. When the sufficiency of the evidence is questioned on appeal, all the relevant evidence must be viewed in the light most favorable to the government in order to determine whether there was substantial evidence to support the conviction. See *Glasser* v. *United States*, 315 U.S. 60, 80; *Battles* v. *United States*, 388 F.2d 799, 801-802 (C.A. 5); *Downing* v. *United States*, 348 F.2d 594, 601 (C.A. 5), certiorari denied, 382 U.S. 901. Here the quantum of evidence was sufficient for "the jury [to] properly find or infer [guilt] beyond a reasonable doubt." *Mortensen* v. *United States*, 322 U.S. 369, 374, reaffirmed in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787 n. 4.

Two eyewitnesses placed petitioner at the scene of the crime. While their identifications were less than positive, their testimony was competent and its weight was for the jury, which apparently chose to credit the witnesses' observations. Moreover, independent circumstantial evidence gave substantial corroborative weight to the identifications. Agent Domalewski testified that petitioner had stated that he had been un-

employed from January 1963 until January 1965. Petitioner's girl friend recounted that petitioner—on the day before the robbery—had wired her for money because he was nearly broke. Petitioner, therefore, was lacking in visible means of support, thus providing ample motive for the robbery. Peacock's girl friend stated that Peacock had left her at a transit station for approximately two hours on the day of the robbery at about the time the offense was committed. The jury could quite reasonably have inferred therefrom that petitioner was left behind that morning in order to pick up the getaway car and thereafter met Peacock; that the two proceeded to rob the bank; and that they then separated. Significantly, the red Corvair used in the robbery was later discovered abandoned near the transit station at which Peacock had effected a rendezvous with his girl friend. In view of all these circumstances, it is clear that the government fulfilled its burden of furnishing adequate proof of petitioner's guilt on which the jury could base a guilty verdict.

2. The court below properly found that the trial court's instructions cured any possible error with respect to the exhibition of and the testimony concerning the guns. This testimony had in itself little probative value as to petitioner, since there was no evidence that petitioner had a gun in his possession at the time of the bank robbery. Rather, his co-defendant had been identified as the man who had a gun during the robbery. When, in addition, the court made explicitly clear to the jury that the guns taken from petitioner had not been tied to the robbery in any way,

there is no reason to believe that the jury did not disregard this matter in considering the evidence against petitioner.

There is nothing in the record to support the insinuation (Pet. 10-11) that the jury disregarded the court's instructions, or was otherwise influenced by the exhibition of, or the testimony respecting, the guns seized from petitioner. On the contrary—and unlike the situation in *Bruton* v. *United States*, 391 U.S. 123—the jury's verdict of guilt as to the lesser offense described in Section 2113(a), rather than the armed robbery offense under Section 2113(d), supports the opposite conclusion. Moreover, the instant case is wholly unlike *Barbee* v. *Warden, Maryland Penitentiary*, 331 F.2d 842 (C.A. 4), relied upon by petitioner. There, the exhibition of the weapon clearly gave rise to an inference that it had been employed in the commission of the offense when the State knew that ballistics reports demonstrated that the weapon could not have been used in the crime. Here the jury was expressly told that the guns had not been connected with the robbery.[5]

3. Finally, the failure of the trial court to require production of the photograph which had been misidentified by witness Maruna did not result in a violation

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[5] Testimony with respect to money found in petitioner's possession at the time of the arrest was properly received. Possession of $780 by one admittedly unemployed was a circumstance of probative value. See *Banning* v. *United States*, 130 F.2d 330, 335-336 (C.A. 6), certiorari denied, 317 U.S. 695. Cf. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 670. The agent also testified to petitioner's explanation of the possession, but this explanation was never verified by the defense.

of due process. It was the *fact* of prior misidentification—not the photograph itself—which was significant to the defense, and defense counsel made effective use of that fact. The defense also elicited from Maruna on cross-examination the physical description which had led him to identify Grimm as the man he had seen—30 years of age, "blonde hair," and a "pointed" nose with "features resembling Lloyd Nolan's" (Tr. 204, 213). Apparently this description also matched that of petitioner. In these circumstances, the court committed no error in refusing to delay the trial in order for government counsel to seek out the photograph, which he had never seen. The situation presented here is wholly unlike those presented in *Brady* v. *Maryland*, 373 U.S. 83, and *Giles* v. *Maryland*, 386 U.S. 66, where the prosecution actively concealed from the defense both the *existence* and the *exculpatory nature* of evidence in its possession.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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